No. 56768-7-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

VINCENT ROBERSON,
Appellant,
v.
CHI FRANCISCAN, et al.,
Respondents.

APPEAL FROM KITSAP COUNTY SUPERIOR COURT
THE HONORABLE WILLIAM C. HOUSER

BRIEF OF RESPONDENTS GRABOWSKI & KRAMER

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I. INTRODUCTION

The trial court correctly dismissed this medical malpractice action because plaintiff's non-physician expert conceded that she could not competently speak to the standard of care of two board-certified medical specialists, gastroenterologist Dr. Clarence Michael Kramer and radiologist Dr. William Grabowski, who consulted on appellant Vincent Roberson's care while he was on a ventilator and hospitalized for pneumonia. This Court should affirm the trial court's summary judgment of dismissal in favor of Drs. Grabowski and Kramer.

II. RESTATEMENT OF ISSUES

1. Could the plaintiff in this medical negligence action establish a triable issue of fact that any act or omission of two consulting specialists breached the applicable standard of care?

2. Did the trial court correctly rule that a nurse practitioner lacks the qualifications to testify to the

standard of care of a board-certified physician practicing in a specific specialty or that her opinion that they breached an undefined standard of care lacked any factual foundation?

III. RESTATEMENT OF THE CASE

Appellant Vincent Roberson's statement of the case largely focusses on the history of his in-patient care and treatment for pneumonia at Tacoma General Hospital and at Regional Hospital for Respiratory and Complex Care, based on the medical records that his non-physician expert, an advanced registered nurse practitioner (ARPN), reviewed in opining that respondents Drs. Kramer and Grabowski, consulting specialists in gastroenterology and radiology ("respondent specialists"), breached some general standard of care. While purporting to recite the facts in the light most favorable to the non-moving party, Mr. Roberson omits the material, undisputed fact that Drs. Grabowski and Kramer were at no point primarily

responsible for Mr. Roberson's care and treatment, but assisted his primary care providers as consulting specialists. This restatement of the case relies on the undisputed evidence related to the respondent specialists' limited role in Mr. Roberson's care. *See Folsom v. Burger King*, 135 Wn. 2d 658, 663, 958 P.2d 301 (1998) ("An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court . . .").

A. Plaintiff, hospitalized with pneumonia, was placed on a ventilator and fed through a feeding tube.

Vincent Roberson, age 42, was admitted to Tacoma General Hospital on March 12, 2014, two days after his family found him at home unconscious and breathing abnormally. (CP 39, 267, 607-08) He was diagnosed with pneumonia and acute respiratory distress, progressing to chronic respiratory failure. (CP 41, 607) As his respiratory status continued to worsen, Mr. Roberson was moved to

intensive care, where he was placed on a ventilator and given numerous steroids, antibiotics, a beta blocker, and sedated with antipsychotics and pain medication to treat "severe delirium" requiring "heavy sedation." (CP 42, 268, 610)

On April 2, 2014, almost three weeks into his hospital stay, Mr. Roberson underwent a tracheostomy and a PEG (percutaneous endoscopic gastrostomy) tube was placed; he was unable to obtain sufficient nourishment because he remained on a ventilator due to ongoing respiratory failure. (CP 42, 268, 610) On April 4, 2014, Mr. Roberson, though still requiring ventilator support, was deemed sufficiently stable to transfer to a long-term acute care hospital. (CP 42, 268, 610) He was admitted to Regional Hospital for Respiratory and Complex Care on April 4 for continued respiratory care, with the goal of weaning him off the ventilator. (CP 50-52, 268, 633-35)

B. Dr. Grabowski and Dr. Kramer were not responsible for plaintiff's care, but were consulted, as specialists, by his providers at Regional Hospital.

Upon transfer, Mr. Roberson's providers at Regional Hospital ordered an x-ray of his kidneys, ureters, and bladder with contrast ("KUB") to check the position of his PEG tube, and also ordered a chest x-ray for "evaluation for tube and line placement." (CP 54, 68) Both x-rays were performed at 3:19 p.m. (CP 54, 68) The chest x-ray was read later that evening by Dr. John Little from the radiology group "Radia." (CP 54, 68)

1. Dr. Grabowski read plaintiff's x-rays remotely.

Dr. Grabowski is a board-certified radiologist who practiced with the radiology group iRad Radiologists in 2014. (CP 84) Dr. Grabowski was not present at Regional Hospital at any time during Mr. Roberson's care, and had no role in ordering the imaging or deciding how it would be performed. (CP 84) Instead, he was sent a digital view of

the KUB x-ray on April 4, 2014, and read the x-ray remotely the next day. (CP 55, 69, 84) Dr. Grabowski noted that 30 mL of contrast had been injected through the PEG tube to confirm its placement. (CP 55, 69) He noted as an impression that the PEG tube was in position. (CP 55, 69) There is no evidence that Dr. Grabowski misread that April 4 X-ray.

Mr. Roberson pulled out his PEG tube on the evening of April 4, requiring the Regional Hospital staff to replace it. (CP 57, 446) Mr. Roberson's providers at Regional then ordered a repeat KUB x-ray with contrast to check the PEG tube placement. They also ordered a portable chest x-ray to be performed at the same time, due to Mr. Roberson's diminished breath sounds and decreasing oxygen saturations. (CP 71)

Radia radiologist Dr. David Alexander read the chest x-ray (CP 71) and Dr. Grabowski again read the abdominal KUB contrast x-ray remotely, on the morning of April 5th.

He found that the PEG tube was “again noted within the stomach” and “no abnormal extravasation is seen.” (CP 58, 72) His impression was that the “PEG tube [is] in position.” (CP 58, 72) Again, there is no evidence that this impression was erroneous.

Regional Hospital staff ordered another portable chest x-ray and KUB x-ray, without contrast, on the morning of April 5, 2014, due to a history of “increasing abdominal distention.” (CP 74) Dr. Grabowski read both films, again remotely. (CP 84)

On the chest x-ray, Dr. Grabowski's impression was that there was “decreased left lower lobe atelectasis and probable unchanged left pleural effusion.” (CP 74) On the KUB he noted that there was air in the colon and moderate distention without evidence of obstruction. (CP 74) He noted that “[t]he gastric contrast seen previously is

diluted." (CP 74) His impression was that Mr. Roberson had a "moderate colonic ileus."[1] (CP 75)

There is no evidence that this report was erroneous in any way. Reading these x-rays on April 5, 2014, was the last involvement Dr. Grabowski had with Mr. Roberson's care.

2. Dr. Kramer was called in to consult, and evaluated plaintiff only once, when hospital staff suspected liver damage.

Dr. Kramer is a board-certified gastroenterologist, who was asked to consult on April 7, 2014, because Mr. Roberson's labs showed signs of liver damage. (CP 274) Dr. Kramer evaluated Mr. Roberson and noted "multiple medical problems with probable shock liver suspected shock liver secondary to recent acute hypoperfusion." (CP

[1] An ileus is nonmechanical bowel obstruction, occurring when the muscles in the digestive tract stop normal movement.

656)[2] This single consult was Dr. Kramer's only involvement in Mr. Roberson's care.

C. Plaintiff was transferred back to Tacoma General for surgery after a CT scan revealed his PEG tube had been dislodged.

On April 8, 2014, nursing staff noted that Mr. Roberson's fluid intake exceeded his output and his abdomen was distended. (CP 276) They ordered another KUB x-ray that day, without contrast. (CP 277) Mr. Roberson apparently continued to have a distended abdomen, which prompted an abdominal CT scan on April 9. The CT, read by Dr. Peter Ory, showed that the PEG tube was dislodged. Mr. Roberson was transferred back to Tacoma General Hospital for surgical intervention. (CP 61, 279, 664-65)

[2] Shock liver is an acute liver injury caused by insufficient blood flow (hypoperfusion), and resulting oxygen deprivation, to the organ.

D. The trial court dismissed the claims against respondents because plaintiff had no competent expert testimony that either consulting specialist violated the applicable standard of care.

Mr. Roberson filed his complaint alleging medical negligence on March 22, 2017, naming as defendants Regional Hospital and its owner CHI, Franciscan, Sound Inpatient Physicians, Inc. and its employees Embra Roper, MD, Coriander Heridia, ARNP, as well as Drs. Grabowski and Kramer. (CP 2-3) Mr. Roberson's theory was that the medical professionals treating him at Regional Hospital failed to perform proper tests or properly determine that his feeding tube was dislodged, exacerbating his condition. (CP 3-10)

The respondent specialists moved for summary judgment on the grounds that Mr. Roberson lacked qualified expert testimony to support any element of his claim, including specifically breach of duty and causation. (CP 128-36, 149-57) In his opposition, Mr. Roberson relied

on the declaration of an advanced registered nurse practitioner, Cheryl Hahn. (CP 472, 502) ARNP Hahn conceded that she "may not be competent to give testimony on the standard of care with a particular doctor's specialty," but nonetheless opined that "any provider, from nurses, to MD specialists, who assumed primary responsibility for Mr. Roberson's care at any time while he was at Regional Hospital . . . failed to meet the standard of care to which any primary provider, regardless of the level of medical licensure or specialization can be held." (CP 164)

The trial court granted Dr. Grabowski's and Dr. Kramer's motions for summary judgment on August 25, 2017 (8/25/17 RP 2-3), and dismissed Mr. Roberson's claims against respondent specialists. (CP 1049-53) It took another four years for the trial court to resolve the remaining claims, dismissing Sound Inpatient Physicians, Inc. and its employees, on November 19, 2021. (CP 1055-56)

Mr. Roberson filed his notice of appeal on December 13, 2021. (CP 1045)[3]

IV. ARGUMENT

Dr. Grabowski and Dr. Kramer were specialists who consulted with Mr. Roberson's primary physicians and hospital staff responsible for his in-patient care. Mr. Roberson lacked competent evidence to establish a breach of the standard of care of either a gastroenterologist or a radiologist practicing in the state of Washington because his expert, an advanced registered nurse practitioner, disclaimed any knowledge of the applicable standard of care. This Court should affirm the trial court's summary judgment of dismissal of respondent specialists.

[3] Respondent specialists filed a prophylactic notice of cross-appeal (CP 1058), which they now dismiss.

A. Plaintiff could not establish that either Dr. Grabowski or Dr. Kramer breached the standard of care of a reasonably competent physician practicing in the relevant specialty.

The Washington legislature codified the law of medical malpractice, requiring a plaintiff suing a physician for negligence to bear the burden of proving as a "necessary element[] of proof" that "[t]he health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances." RCW 7.70.040(1).

"The applicable standard of care in medical malpractice actions must generally be established through expert testimony." *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 86, ¶10, 419 P.3d 819 (2018). The standard of care of a reasonably prudent physician in Washington, acting in similar circumstances, is a "prime example" of the type of expert testimony required by ER 702, because it is

outside the understanding and experience of a layperson. *Reese v. Stroh,* 128 Wn.2d 300, 308, 907 P.2d 282 (1995). "The policy behind this rule is to 'prevent laymen from speculating as to what is the standard of reasonable care in a highly technical profession.'" *Housel v. James*, 141 Wn. App. 748, 759, 172 P.3d 712 (2007), quoting *Douglas v. Bussabarger*, 73 Wn.2d 476, 479, 438 P.2d 829 (1968); *see Harris v. Robert C. Groth, M.D., Inc., P.S.,* 99 Wn.2d 438, 449, 663 P.2d 113 (1983).

Mr. Roberson concedes that "expert testimony will generally be necessary to establish the standard of care." (App. Br. 12, quoting *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 228, 770 P.2d 182 (1989)). But Mr. Roberson's suggestion that no expertise was required here, where he claims two consulting specialists acted negligently in their limited roles in advising his primary care providers, is a far cry from "amputating the wrong limb" (App. Br. 12), or other acts of negligence "so apparent

as to be within the comprehension of laymen." *Young*, 112 Wn.2d at 228-29 (quotation and internal citation omitted).

"[T]o establish the standard of care required of professional practitioners, that standard must be established by the testimony of experts who practice in the same field. The duty of physicians must be set forth by a physician, the duty of structural engineers by a structural engineer and that of any expert must be proven by one practicing in the same field—by one's peer." *McKee v. Am. Home Prod. Corp.*, 113 Wn.2d 701, 706-07, 782 P.2d 1045 (1989), citing *Young*, 112 Wn.2d 216. "This court has never accepted . . . a rule that would allow a nonphysician to testify as an expert regarding the proper standard of care for a physician practicing a medical specialty." *Young*, 112 Wn.2d at 227. That statement remains true today, 33 years after the Supreme Court decided *Young*.

In *Young*, the Court held that a pharmacist may not define the standard of care for a physician sued for

negligence for prescribing a drug for a child's asthma and then failing to adequately monitor the child's blood for the presence of the drug. "[T]he cases uniformly hold that a physician's testimony is necessary in such cases to defeat a defendant's motion for summary judgment." *Young*, 112 Wn.2d at 228.

Here, Nurse Hahn admitted she could not competently "give testimony on the standard of care with a particular doctor's specialty," and offered none. (CP 164) That concession is dispositive.

Dr. Grabowski is a board-certified radiologist, who consulted on Mr. Roberson's care by reading X-rays remotely, without physically examining or even meeting him. (CP 84-85) Dr. Kramer is a board-certified gastroenterologist, who saw Mr. Roberson once, at the request of his primary care providers, who sought a gastroenterology consult for suspected liver damage. (CP 274) Neither Dr. Grabowski nor Dr. Kramer assumed

primary responsibility for Mr. Roberson's care, nor a duty to "generally assess the patient," as Mr. Roberson argues. (App. Br. 16) Each was instead consulted for a limited and specific purpose, not a "general assess[ment]."

On this record, a jury could only speculate whether a reasonably prudent consulting radiologist or gastroenterologist should have, in the exercise of reasonable care, determined that Mr. Roberson's PEG tube was dislodged. Nor is there any competent evidence that the PEG tube was in fact displaced at the time these two specialists consulted on Mr. Roberson's care.

Specifically, Nurse Hahn's allegation that Dr. Kramer "as a GI specialist, should have been the one to determine what the problem actually was" (CP 168), must fail in the absence of any evidence that what a reasonably prudent gastroenterologist consulting on Mr. Roberson's case, would have done in the exercise of reasonable care, in the same or similar circumstances. Similarly, Roberson's

contention that Dr. Kramer and Dr. Grabowski both "failed to use very basic evaluative reasoning" in failing to determine that "the PEG tube was . . . in[] the wrong place" (App. Br. 19, *see* CP 168) is unsupported by any evidence of what "evaluative reasoning" is required of a "reasonably prudent health care provider at that time *in the profession or class to which he or she belongs,* in the state of Washington, acting in the same or similar circumstances" [*i.e*, a specialist]. RCW 7.70.040(1) (emphasis added).[4]

Where, as here, "a plaintiff lacks competent expert testimony to create a genuine issue of material fact with regard to one of the elements of the claim . . . a defendant is entitled to summary judgment." *Reyes*, 191 Wn.2d at, 86, ¶10. This Court should affirm because Mr. Roberson failed

[4] Nurse Hahn's assumption that the PEG tube was improperly placed at the time of respondent specialists' assessment also lacks any foundational support. (Arg. § B, *infra*)

to establish a prima facie case of medical negligence against either of the respondent specialists.

B. Nurse Hahn's opinion that respondent specialists breached the standard of care was inadmissible under ER 702 and ER 703.

While Nurse Hahn's opinion that these specialists breached an undefined standard of care was insufficient to defeat summary judgment, her opinion falters on the threshold basis that it was inadmissible under ER 702 because she was not "qualified as an expert by knowledge, skill, experience, training or education" to opine on the standard of care of either a radiologist or a gastroenterologist. And her assessment that these two specialists assumed "primary responsibility" for Mr. Roberson's care (CP 164) also demonstrates that her opinion lacks an adequate factual foundation under ER 703. This Court may affirm dismissal of the medical negligence claim on this alternative basis, as respondents argued below. (CP 128-36, 149-57)

To testify to the standard of care of a physician practicing as a specialist, a medical expert "must demonstrate that he or she has sufficient expertise in the relevant specialty." *Young*, 112 Wn.2d. at 229. Since *Young*, no Washington case has allowed a nurse (advanced, registered, or otherwise) to testify to the standard of care of a board-certified specialist.

In *Frausto v. Yakima HMA, LLC,* 188 Wn.2d 227, 234, ¶13, 393 P.3d 776 (2017) (App. Br. 12-15), the Court held that since an "ARNP is qualified to independently diagnose a particular medical condition, it follows that the ARNP may have the requisite expertise under ER 702 to discuss medical causation of that condition." In misplacing his reliance on *Frausto*, Mr. Roberson ignores that competency in diagnosing and discussing a particular medical condition and its causes is a far cry from being qualified to offer an opinion on the standard of care of a medical doctor practicing in a particular specialty, even

had Nurse Hahn offered one. *See Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 451, ¶39, 177 P.3d 1152 (2008) (threshold question for expert testimony on standard of care under RCW 7.70.040 is "(1) Is the expert a physician with a medical degree?").

Though some jurisdictions categorically prohibit a nurse from testifying to the standard of care of a medical doctor based on their states' licensing statutes,[5] this Court need not adopt that per se exclusion to hold that Nurse Hahn failed to make the threshold showing of "knowledge,

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[5] *See, e.g., Morris v. Children's Hosp. Medical Ctr.*, 73 Ohio App.3d 437, 597 N.E.2d 1110, 1114-15 (1991) (registered nurse not competent to testify to standard of care of a physician); *Rudy v. Mershorer*, 146 Ariz. 467, 706 P.2d 1234, 1237 (1985) ("The testimony of a registered nurse cannot be used to establish the standard of care a doctor must meet."); *Stryczek v. Methodist Hosps., Inc.*, 694 N.E.2d 1186, 1189 (Ind. App. 1998) (nurse not qualified to testify that physicians providing radiation treatment and chemo therapy breached standard of care as she "had neither the same education nor training as physicians" and license is "limited to treatments which are amenable to a nursing regimen."). *See generally*, 61 *Am. Jur. 2d Physicians and Surgeons* § 327 (collecting cases).

skill, experience, training or education" under ER 702 to offer an admissible expert opinion on the relevant standard of care. In Washington, even possession of a medical degree does not qualify a physician to testify to a specialist's standard of care where the testifying physician lacks sufficient expertise to demonstrate familiarity with the applicable standard of care in the particular specialty.

A practitioner in one specialty is incompetent to testify as an expert in a malpractice action against a physician in a different specialty unless "(1) the methods of treatment in the defendant's school and the school of the witness are the same; (2) the method of treatment in the defendant's school and the school of the witness should be the same; or (3) the testimony of a witness is based on knowledge of the defendant's own school." *Miller v. Peterson*, 42 Wn. App. 822, 831, 714 P.2d 695, *rev. denied*, 106 Wn.2d 1006 (1986). *See Eng v. Klein*, 127 Wn. App. 171, 110 P.3d 844 (2005) (infectious disease specialist

qualified to testify to standard of care of neurosurgeon who failed to diagnose bacterial meningitis following neurosurgery), *rev. denied*, 156 Wn.2d 1006 (2006). Other jurisdictions have applied this standard to hold that a nurse practitioner lacked the "specialized knowledge" of the standard of care of a medical doctor, particularly one practicing medicine in a particular specialty. *See Shipp v. Murphy*, 9 F.4th 694, 701 (8th Cir. 2021) (nurse practitioner lacked "specialized knowledge" to assist the trier of fact).[6]

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[6] *See, e.g., York v. Northern Hosp. Dist. of Surry County*, 88 N.C. App. 183, 362 S.E.2d 859, 864 (1987) (affirming exclusion of nurse's testimony on standard of care required by a surgeon or anesthesiologist during repeat Caesarean section where nurse was unfamiliar with applicable standard of care), *rev. denied*, 322 N.C. 116 (1988); *Tucker v. Talley,* 267 Ga. App. 820, 600 S.E.2d 778, 782 (2004) (nurse practitioner lacked expertise to opine that physician should have done more testing to determine plaintiff suffered from meningitis); *Taplin v. Lupin,* 700 So. 2d 1160, 1162 (La. App. 1997) (nurse "not qualified to testify whether Dr. Kuebel, a physician certified in internal medicine, breached the applicable standards of care").

Here, Nurse Hahn, who disclaimed any knowledge of the standard of care of specialists, failed to establish that she was either competent to offer an opinion on a specialist's standard of care or that she had an adequate factual basis for her opinion. Hahn averred that she had the "requisite training, licensure, and experience to competently discuss the standard of care and responsibilities of a medical provider *who has or had primary responsibility for patient care*." (CP 164, emphasis added) Her opinion that these respondent specialists breached some undefined standard of care "to assess the 'big picture'" (App. Br. 16), to assume "primary responsibility for patient care," to "test for PEG tube displacement," or order other tests, "which would have confirmed improper placement of the PEG tube" (CP 164) lacks any factual basis.

"There is no value in an opinion that is wholly lacking some factual basis." *Queen City Farms, Inc. v. Central Nat.*

Ins. Co. of Omaha, 126 Wn.2d 50, 102-03, 882 P.2d 703 (1994). *See* Tegland, 5B *Wash. Practice: Evidence Law and Practice,* §703.8 (2012) ("Nothing in Rule 703 or any other rule allows an expert to express an opinion when the expert has not even become sufficiently familiar with the pertinent facts to form an opinion."). Moreover, an affidavit that fails to identify specific facts to support allegations of professional negligence is insufficient to defeat summary judgment under CR 56(e)'s standard, requiring "specific facts showing that there is a genuine issue for trial." *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, n.5, 851 P.2d 689, *rev. denied*, 122 Wn.2d 1010 (1993), quoting CR 56(e).

These two specialists were asked to consult with Mr. Roberson's primary care providers. Neither Dr. Grabowski nor Dr. Kramer were responsible for monitoring Roberson's condition on a continual basis, but provided expertise on his condition at a particular point in time. The

trial court properly dismissed the negligence claim against them in the absence of competent and admissible expert testimony on summary judgment.

C. Respondent specialists join in their co-respondent's arguments.

The respondent specialists join in the arguments of their co-respondent, Sound Inpatient Physicians, Inc. pursuant to RAP 10.1(g).

V. CONCLUSION

This Court should affirm the dismissal of the claims against Drs. Grabowski and Kramer on the ground that Roberson could not raise a triable issue of fact that either specialist violated the applicable standard of care.

I certify that this brief is in 14-point Georgia font and contains 3,943 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 1st day of August, 2022.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

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August 01, 2022 - 1:42 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56768-7
Appellate Court Case Title:	Vincent Roberson, Appellant/Cross Respondent v. CHI Franciscan, et al., Respondents/Cross-Appellants
Superior Court Case Number:	17-2-00485-7

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